Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of SOUTHWESTERN BELL MOBILE SYSTEMS, INC. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments

No. DA 97-2464

COMMENTS OF PLAINTIFFS IN THE SMILOW ACTION IN RESPONSE TO SOUTHWESTERN BELL'S PETITION FOR DECLARATORY RULING

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Jill Ann Smilow ("Smilow"), the plaintiff in the class action *Smilow v. Southwestern Bell Mobile Systems, Inc.*, DV 97-cv-10307-REK (D. Mass.) ("the Smilow Action"), submits the objections and comments set forth below in response to Southwestern Bell Mobile Systems, Inc.'s ("Southwestern Bell") Petition for Declaratory Ruling ("the Petition") filed with the Federal Communications Commission ("the Commission") on November 12, 1997. These comments and objections are timely filed pursuant to Federal Communications Commission Public Notice DA 97-2464 released on November 24, 1997.

Introduction

Southwestern Bell states in the Petition that various class action lawsuits throughout the country, including the above-referenced Smilow Action, have challenged the manner in which CMRS providers charge customers for calls in whole-minute, rather than per-second, increments.[1] From Southwestern Bell's description in the Petition of the claims in the Smilow Action, one would conclude that Smilow claims that Southwestern Bell's practices of: (1) charging in whole-minute increments; and (2) charging for incoming calls are *per se* violations of § 201(b) of the Communications Act of 1934 ("the Communications Act"). In fact, Southwestern completely mischaracterizes Smilow's claims. Significantly, Southwestern Bell does not provide the Commission with a copy of the complaint in the Smilow Action ("the Smilow Complaint"). A copy of the Smilow Complaint is attached hereto as Exhibit A. As is clear from the Smilow Complaint, plaintiff in the Smilow Action alleges that Southwestern Bell's practices of charging for incoming calls and charging in whole minute increments is actionable only because it

[1] The Smilow Action is the only action identified in which Southwestern Bell is a party. See footnote one to the Petition.

violates, and is contrary to, the terms of Southwestern Bell's contracts with its customers. Smilow has not challenged the reasonableness of Southwestern Bell's rates, or the reasonableness, *per se*, of rounding up or charging for incoming calls. Smilow only alleges that Southwestern Bell has failed to abide by the terms of its contracts, which it drafted, and in failing to do so, violated Massachusetts's consumer protection statute, as well as the Communications Act, because its past and continuing breach of the contracts is unjust.[2] Remarkably, despite the fact that the key issue in the Smilow Action is the contract, Southwestern Bell does not even mention the contract in the Petition. The contract is Exhibit 1 to the Smilow Complaint ("the Contract").

Southwestern Bell has requested the Commission to issue a declaratory ruling on six issues that have not been raised in the Smilow Action, the resolution of which will have no bearing on the outcome of the Smilow Action.[3] In fact, as the Court in the Smilow Action has found, the only reason Southwestern Bell has filed the instant Petition is in an unacceptable effort to delay the orderly litigation of the Smilow Action. Accordingly, the Commission should dismiss the Petition without a ruling.

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[2] Paragraph 36 of the Smilow Complaint alleges that: "The defendant's conduct constitutes unjust practices in violation of § 201 (b) of the Communications Act (47 U.S.C. § 201(b))." The Smilow Complaint does not allege violation of the more general proscription in that section of the statute against "unreasonable" practices.

[3] Southwestern Bell requests that the Commission issue a declaratory ruling: (1) that Congress and the Commission have established a general preference for competition over regulation in the CMRS marketplace; (2) that rounding up and charging to place or receive a call are common industry practices that are not unjust or unreasonable under Section 201(b) of the Act; (3) that "call initiation" in the CMRS context occurs when the customer activates the phone to place or receive a call; (4) that the term "rates charged," as used in Section 332(c)(3) of the Act, includes at least the choice of which services to charge for and how much to charge for them; (5) that challenges to the rates charged to end users by CMRS providers are exclusively governed by federal law; and (6) that state law claims directly or indirectly challenging CMRS rates are barred by Section 332(c)(3) of the Act.

Procedural History

On February 11, 1997, Smilow filed the Complaint against Southwestern Bell in the United States District Court for the District of Massachusetts. On March 21, 1997, Southwestern Bell filed a Motion to Dismiss the Class Action Complaint requesting the Court to dismiss the Complaint and to refer it the Commission for resolution under the doctrine of primary jurisdiction. Plaintiff opposed the motion and on July 11, 1997, the Court denied Defendants' Motion to Dismiss. Thereafter, on July 22, 1997, Southwestern Bell filed a Motion to Stay the Smilow Action, pending action by the Commission on a filing which Southwestern Bell represented to the Court that it would be making with the Commission. A copy of Southwestern Bell's Motion to Stay is attached hereto as Exhibit B.

Thereafter, a hearing on Southwestern Bell's Motion to Stay was scheduled for November 13, 1997. On November 12, 1997, **the day before the hearing**, Southwestern Bell filed the instant Petition with the Commission and filed a copy with the Court. On November 13, 1997, plaintiffs filed Plaintiff's Observations Regarding Petition For Declaratory Ruling Filed By The Defendant On November 12, 1997 With The Federal Communications Commission. That document is attached hereto as Exhibit C.

At the November 13, 1997 hearing on its Motion To Stay, Southwestern Bell argued that the Court should stay the Smilow Action until the Commission acted on its just filed Petition. The Court denied Southwestern Bell's Motion to Stay, finding that the instant Petition was filed with the Commission only as a tactic to delay the Smilow Action. The Court, in strong language, said:

> Now, on November 13th when I'm about to have a hearing I am advised for the first time that Cellular One, or Southwestern Bell, gets around to filing something before the FCC. And **what is filed** when I look at it and look at the exhibits attached to it is not something that's filed because of something that's happened fairly recently that would affect it any way, but goes back for years and doesn't fill in the time in between and **doesn't mention** this case and **this contract**. Well, it may mention this case. I guess it does. **It doesn't mention the contract involved in this case.**
>
> **Now, that on its face is simply an effort to get a delay in this case and so I'm not going to allow that.** So docket number 13, Cellular One's Motion to Stay the Class Action Complaint, is denied.

Transcript pp. 6-7, emphasis added.[4]

The Commission should not expend its resources on a Petition that the Federal District Court has already found was filed by Southwestern Bell in a transparent attempt to needlessly delay resolution of the Smilow Action.

Facts

The crux of the allegations set forth in the Complaint is that Cellular One breached the terms of the Contracts that it entered into with Smilow and the other members of the class, by charging these individuals for the cellular service they purchased in a manner that was in conflict with the terms of the Contracts.

Southwestern Bell sells cellular service pursuant to written form contracts, which are drafted by the defendant. The relevant provisions of the Contract read as follows:

> 1. ... Notwithstanding the terms and provisions of any other agreement which are inconsistent with this agreement **these terms and conditions constitute the entire agreement between the parties.**

[4] A copy of the transcript of the November 13, 1997 hearing in the Smilow Action is attached hereto as Exhibit D.

2. C1 [Cellular One][5] will provide Customer with cellular telephone service (the "Service") and Customer agrees to pay for the Service and all other charges **on the terms and conditions herein ....**

13. **Chargeable time for calls originated by a Mobile Subscriber Unit** starts when the Mobile Subscriber Unit signals call initiation to C1's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to C1's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

(Emphasis added).[6]

Contrary to, and in breach of, paragraph 13 of the Contract, Southwestern Bell not only charges the plaintiff and the members of the class for cellular telephone calls which are "originated by" their cellular phone or "Mobile Subscriber Unit," it also charges them for time of calls received by their cellular phones. (Complaint ¶¶ 16 and 17).

Also contrary to paragraph 13 of the Contract, which provides that plaintiff is to be charged only for the period from when "the Mobile Subscriber Unit signals call initiation to C1's facilities" to "when the Mobile Subscriber Unit signals disconnect to C1's facilities and the call disconnect signal has been confirmed", (Complaint ¶ 18), Cellular One "rounds up" the actual time used by plaintiff and the other class members to the next whole minute, and charges for that entire whole minute. (Complaint ¶¶ 18 and 19).

That is all the Smilow Action is about. All that has to be decided on the liability aspect of the Smilow Action is whether the defendants' admitted conduct of:

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[5] Southwestern Bell sells cellular services in some geographic areas under the trade name Cellular One.

[6] As previously noted, a copy of the Contract between Smilow and Southwestern Bell, is Exhibit 1 to the Smilow Complaint, which in turn is Exhibit A hereto.

a. charging for calls received by, as well as those originated by, the cellular phones of the plaintiff and the class; and

b. rounding up the time of each call to the next whole minute and charging for that whole minute:

1. Breached the unambiguous, inclusive Contract, drafted by the defendant, because they were not permitted by, and were in conflict with, the Contract (Count I of the Complaint);

2. Were "unjust" practices, in violation of § 201 (b) of the Communications Act, because they were not permitted by, and were in conflict with, and were a breach of, the Contract (Count II of the Complaint); and

3. Were unfair and deceptive acts and practices, in violation of M.G.L. Ch. 93A, § 2(a), because they were not permitted by, were in conflict with, and were a breach of, the Contract (Count III of the Complaint).

The underlined phrases in the numbered paragraphs above set forth the key factual aspect of the Smilow Action which Southwestern Bell purposely ignores in its Petition to the FCC. Plaintiff's only claim that Southwestern Bell has violated § 201 (b) of the Communications Act is that its practices of charging for incoming calls and rounding up each call to the next minute, is an "unjust" practice, in violation of § 201 (b), because they were not permitted by, and were in conflict with, and were a breach of, the Contract.

In her federal court action, Smilow makes no general economic, political, philosophical, ethical or other generalized challenge to the practices of rounding up and

charging for incoming calls. Smilow only attacks those practices of Southwestern Bell because they violate the Contract.

The fact that plaintiff is not challenging Southwestern Bell's billing practices generally is also apparent from the definition of the proposed class in the Smilow Action, which reads as follows:

> 23. This action is brought by the plaintiff as a class action, pursuant to Rules 23(a), 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of all persons and entities throughout the United States which purchased cellular service from the defendant Southwestern Bell Mobile Systems, Inc., pursuant to contracts similar to the plaintiff's Contract which:
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> a. provide for charges only for calls originated by the customer's cellular phone and not for calls received by the customer's cellular phone; and/or
>
> b. contain a definition of Chargeable Time or a description or definition of the time for which a charge may be made, which does not include time resulting from the rounding up to the next whole minute the time of each call; and
>
> c. do not incorporate by reference or provide that they are governed by any tariff filed by the defendant with any governmental agency.

(Complaint, ¶ 23)

There are many Southwestern Bell customers who are billed for incoming calls and in one-minute increments, who are not members of the class as defined above. This is because they entered into contracts which stated that Southwestern Bell would bill in that manner. An example of such a contract is attached hereto as Exhibit E. If Smilow was challenging Southwestern Bell's billing practices generally, all customers of Southwestern Bell would be included within the class definition in the Smilow Action. However, since all of the claims in the Smilow Action derive from the fact that the

challenged billing practice violate the Contract, the Southwestern Bell customers whose contracts with Southwestern Bell permit Southwestern Bell to round-up and charge for received calls do not have those claims and hence they are not members of the class in the Smilow Action.

In the Petition, Southwestern Bell has purposely avoided placing the Contract before the Commission and instead has presented generalized issues in the Petition that are completely unrelated to the Smilow Action and which neither the Commission nor a Court needs to address in order to resolve the Smilow Action.[7]

Argument

The Smilow Action Is Not Contrary To The Preference For Market Forces, Rather Than Government Regulation, As The Determinant Of Industry And Southwestern Bell's Rates And Billing Practices

Southwestern Bell observes in the Petition that both Congress and the Commission have taken the position that market forces, rather than government regulation, should determine CMRS industry practices. It also observes that the billing practices at issue, rounding up to the next whole minute and charging for incoming calls:

> are competitve tools and ways in which CMRS carriers are now differentiating themselves in the marketplace. For example, while many CMRS providers bill on a per-minute basis, others offer per-second billing .... Further, while many CMRS providers bill customers for outcoming and incoming calls, ... others are experimenting with billing CMRS charges to the individual, who may be at a landline phone, who places the call. Thus, the Commission should declare that a CMRS provider's choices of rate plans

[7] The Commission need not, and indeed should not, address the Contract issue either. Under § 207 of the Communications Act, Smilow had the right to bring her damage claim against Southwestern Bell to either the Commission or the federal court (but not both). She chose the federal court as the forum to decide her claim, and that choice should be respected by the Commission.

are competitive rate-setting decisions which are best left to the increasingly competitive marketplace.

(Petition, at 6)

Smilow does not allege in the Smilow Complaint and does not suggest that Southwestern Bell's billing practices should be regulated by the government rather than determined by market forces. Market forces can, and presumably did, determine the terms of Southwestern Bell's Contracts with Smilow and the members of the class. **Requiring companies offering cellular service, including Southwestern Bell, to actually bill their customers in accordance with the terms of the contracts entered into with their customers furthers the control of the cellular phone industry by competitive market forces.** If cellular telephone service consumers cannot trust that they will be billed in a manner consistent with the terms of their contracts, and cannot enforce those contracts in court, as Smilow seeks to do, consumers will be unable to make an informed choice after comparing the different types of services and pricing offered by the competing cellular service providers.

Previous Decisions By The Commission Regarding The Practices Of Rounding Up And Billing For Incoming Calls Have No Relevance To The Smilow Action

In support of its billing practices, Southwestern Bell points out that both the Commission and state regulatory commissions have accepted the practices of rounding up and billing for incoming calls in other contexts. Once again, Southwestern Bell advances arguments in support of issues that have not been raised by Smilow in the Smilow Action. Smilow does not claim that Southwestern Bell should never be able to charge for incoming calls or round up calls to whole minute increments. Smilow only

claims that Southwestern Bell cannot engage in those billing practices with her and with the members of the class, because they are not permitted by and constitute breaches of the contracts which Southwestern Bell has entered into with those customers.[8]

Plaintiff In The Smilow Action Has Not Alleged That Southwestern Bell Deceived Her Or Committed Fraud

Southwestern Bell also argues that its billing practices did not mislead the plaintiffs. Southwestern Bell asserts that one could tell from the bills it sent to its customers that it was rounding up to one minute increments and charging for incoming calls.[9] By including this argument in the Petition, Southwestern Bell suggests that plaintiffs have accused Southwestern Bell of misrepresentations or fraudulent conduct. In fact, Smilow makes no such claim in the Smilow Complaint. Smilow has alleged only three causes of action for: (1) breach of contract; (2) violation of the Communications Act; and (3) violation of a Ch. 93A which prohibits unfair consumer practices. There is no claim in the Smilow Action that Southwestern Bell's conduct was deceptive or fraudulent.[10]

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[8] Southwestern Bell also requests that the Commission issue a declaratory ruling on the meaning, the term "call initiation" as used in Smilow's contract with Southwestern Bell. Without any supporting authority whatsoever, Southwestern Bell asks the Commission to conclude that, contrary to its plain meaning the term "call initiation," really means both when a call is initiated by a cellular phone and when a call is received by that phone. The Commission should decline to participate in such sophistry.

[9] Southwestern Bell's bills did reflect that time was charged in whole minute increments. That did not constitute disclosure that the time of each call was being rounded up to the next whole minute. It could mean that the calls were being rounded up or down to the nearest whole minute.

[10] No "disclosures" by Southwestern Bell, in its bills or other mailings, are availing for Southwestern Bell on Smilow's breach of contract claim. As quoted above, ¶ 1 of the Contract, as drafted by Southwestern Bell, says:

> 1. ... Notwithstanding the terms and provisions of any other agreement which are inconsistent with this agreement **these terms and conditions constitute the entire agreement between the parties.**

The Communications Act Preserves State Law Causes Of Action

Southwestern Bell argues at length in the Petition that any state law challenges to its practice of rounding up and charging for incoming calls are preempted by § 322(c)(3) of the Communications Act. Southwestern Bell further argues that an award of damages for state law claims would constitute impermissible state rate regulation. However, § 332(c)(3)(A) provides:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Thus, this section provides only that states cannot regulate the rates charged and, as has already been stated repeatedly, Smilow does not challenge Southwestern Bell's rates in the Smilow Action. She only seeks to enforce application of the contractual terms regarding rates. In fact, even Southwestern Bell concedes that "the state may regulate ... whether a correct CMRS rate was applied." (Petition at 14, fn. 26). This is the critical issue in the Smilow Action: Southwestern Bell contracted to bill plaintiffs pursuant to one set of terms and then, in fact, billed them pursuant to a different set of terms.

In addition, the Communications Act contains a savings clause[11] which preserves state causes of action. Courts interpreting the Communications Act have found that state law claims are not preempted by the Communications Act. In *Financial Planning Institute, Inc. v. A T & T*, 788 F. Supp. 75 (D. Mass. 1992, Skinner, J.) the plaintiff alleged that the

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[11] "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." (47 U.S.C. Sec. 414)

defendant had overcharged it for "800" calls. The plaintiff alleged breach of contract action and violation of M.G.L. Ch. 93A. In holding that those state law claims were not preempted by the Communications Act, the court said:

> ... Not only did Congress not express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunications services, but by enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.

(*Id.* at 77). *See also Cooperative Communications, Inc. v. A T & T*, 867 F. Supp. 1511, 1516 (D. Utah 1994) ("... inclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action ... not be subsumed by the Act, but remain as separate causes of action.").

Congress would not have included the savings clause if it believed that an award of damages in a state law cause of action would constitute state rate regulation. The very fact that the savings clause preserves state cause of actions reflects that customers are entitled to recover damages on their state law claims.

No Tariffs Are Involved In The Smilow Action

There are no tariffs at issue in the Smilow Action. Pursuant to the Communications Act, commercial mobile radio services have no obligation to file tariffs with the Commmission. See 47 U.S.C. §332(c)(1)(A), 47 C.F.R. 20.15(c), "In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services", 9 F.C.C. Record 1411, adopted February 3, 1994. Thus, Southwestern Bell, like all other companies which provide commercial mobile radio services, has no tariffs on file with the Commission.

In addition, the Contract at issue in the Smilow Action neither incorporates nor refers to any tariff. In fact, the Complaint defines the Class as all persons and entities which purchased cellular service from Southwestern Bell pursuant to contracts which "... do not incorporate by reference or provide that they are governed by any tariff filed by the defendant with any governmental agency." Complaint ¶ 23(c).

Two of the three cases that Southwestern Bell cites in support of its claim that damage awards constitute rate regulation are distinguishable from the facts in the Smilow Action because in those two cases, the court found that plaintiffs' claims were barred by the "filed tariff doctrine." Under the filed tariff doctrine, if a tariff is on file with the Commission, the consumer's knowledge of the rate in the tariff is presumed even if that rate was misquoted to the consumer. *Marcus v. A T & T Corp.*, 938 F. Supp. 1158, 1169 (S.D.N.Y. 1996). In addition, "the filed rate doctrine trumps contract defenses." *Id.* at 1169.[12] However, it applies only in situations where the telecommunications company has filed a tariff with the Commission. Southwestern Bell has no tariffs on file and the Smilow Action is limited to customers of Southwestern Bell whose contracts do not reference a tariff. Hence, the filed tariff doctrine, and the court decisions which invoke it, are irrelevant to the Smilow Action.

In *Hardy v. Claircom Communications Group*, 937 P.2d 1128, 1132 (Wash.Ct.App. 1997), plaintiffs alleged that defendants had failed to disclose their billing methods to consumers and that as a result each of the defendants "bilks consumers of millions of

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[12] However, even in a case involving a tariff "... when a party before a court challenges not the reasonableness of a tariff but only whether the carrier has failed to abide by the tariff, no issues requiring agency discretion or expertise are raised." *Bruss Co. v. Allnet Communications Service, Inc.*, 606 F. Supp. 401, 408 (N.D.Ill. 1985).

dollars in illicit charges". The Complaint alleged that the consumers were entitled to the extra money they paid for unused air time and an accounting of all monies wrongfully received as a result of the defendants' billing practices. However, the two defendants had tariffs on file with the FCC which permitted those billing practices. Thus, the court found that plaintiffs' claims were barred by the filed tariff doctrine. In addition, the court rejected plaintiffs' claims that they were challenging only defendants' allegedly deceptive advertising practices not its rates because the court found that plaintiffs had alleged that they had been obliged to pay "illicit charges" and were entitled to refunds for extra amounts billed for unused air time. Thus, the court found that it would have to consider the reasonableness of the rates charged in order to resolve the issue. Similarly in *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996), the court dismissed plaintiffs' claim that AT&T had fraudulently concealed its practice of billing for minutes rounded up to the next minute on the grounds that their claims were barred by the filed rate doctrine.[13]

Similarly, the plaintiff in the Smilow Action challenges the fact that Southwestern Bell breached the Contract because the Company set forth in the Contract a method and manner for billing for calls which was different from the actual manner it billed the class members. Plaintiff's claims focus on Southwestern Bell's failure to bill class members in a manner consistent with the terms of the Contract but do not

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[13] The third case cited by Southwestern Bell supports the proposition that all state law claims are not preempted by the Communications Act. *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1204 (E.D. Pa. 1996).

challenge the reasonableness, *per se*, of Southwestern Bell's practice of rounding up minutes and charging for incoming calls.

An Award Of Damages Would Not Require The Court To Determine The Reasonableness Of The Rate

Southwestern Bell also attempts to mislead the Commission with respect to the nature of the issues presented in the Smilow Action by claiming that a court determining damages suffered by the class would have to determine what was a "reasonable rate," which would involve the court in ratemaking. This is simply incorrect. In order to determine damages in the Smilow Action, the court would first have to determine the difference between the time for which Southwestern Bell could charge pursuant to the terms of the Contract and the time for which Southwestern Bell actually charged its customers. The monetary damages to be awarded the plaintiff and the members of the class would be the amount of money Southwestern Bell charged Smilow and the members of the class for that overbilled time at the "rates" in effect when those calls were made. In awarding these damages, the court would have no need to consider the "reasonableness" of the rates that Southwestern Bell has charged, presently charges or will charge in the future and thus would not be engaged in any aspect of "ratemaking."

In the Smilow Action, plaintiff does not challenge the "rate" defendant charges (*i.e.*, the amount per minute), only the "price" it charges due to its rounding up the "units of service" for each cellular telephone call to the next whole minute, despite the contractual language which does not permit rounding up. The "price" of a phone call would be the "rate" times the number of units of service, so:

"Price = Rate x Units of Service."

Plaintiffs in the Smilow Action do not complain about the defendant's "rate" per minute. They only complain that the "price," under the unambiguous terms of the Contract, cannot be rounded up to the next whole minute because that conflicts with the unambiguous terms of the Contract.

All of the cases cited by Southwestern Bell in support of its argument that in determining damages the court would be involved in ratemaking, are distinguishable. In *Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121-22 (S.D.N.Y. 1992); *aff'd* 27 F. 3d 17 (2d. Cir. 1994), the court found that plaintiffs' RICO and fraud claims against defendants were barred by the filed rate doctrine. As quoted by Southwestern Bell, the court also found that any determination that it made with respect to damages would require it to make a determination regarding the reasonableness of rates: "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two." The court in *H.J., Inc., v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 493-94 (8th Cir. 1992), *cert. denied*, 504 U.S. 957 (1992) also held that plaintiffs' RICO actions were barred by the filed rate doctrine and found that RICO damages could be determined only after the court had determined what the rates should have been absent the alleged fraudulent conduct. Similarly, in *Birnbaum v. Sprint Communications Corp.*, 1996 WL 897326 (E.D.N.Y. Nov. 19, 1996), plaintiffs sought enforcement of a superseded tariff which required the court to determine that the tariff constituted a reasonable rate. The court was precluded by the filed rate doctrine from making this determination. In *Hardy v. Claircom Communications*

Group, 927 P.2d 1128, 1132 (Wash. Ct. App. 1997), the court found that plaintiffs alleged that defendant had made "illicit charges" and that customers had overpaid for unused air time. Thus, in assessing damages, the court had to consider the reasonableness of the rates charged and any damages awarded "would by definition result in their paying something other than the filed rate."

In contradistinction, the Smilow Action does not implicate the filed tariff doctrine and, in addition, plaintiffs have not challenged the underlying rates charged by Southwestern Bell. The rates are not at issue -- only the number of minutes for which Southwestern Bell can charge must be determined by the Court. The Court will not need to make an independent evaluation of whether Southwestern Bell's rates are "reasonable."

Similarly, an injunction which would enjoin Southwestern Bell from measuring time of cellular calls in conflict with the terms of the Contract would not involve the Court in a determination of the reasonableness of rates but would simply enforce the permitted time measurement as set forth in the Contract. Thus, the injunction would require application of Southwestern Bell's rates to a time calculation required by the Contract. No rate would be determined by the court.

Plaintiffs' Claims in the Smilow Action Do Not Challenge or Target Southwestern Bell's Rates

Southwestern Bell suggests in the Petition that plaintiffs in the Smilow Action are actually challenging the rates they were charged although they have "camouflaged" their attack on the rates by structuring the claim as a breach of contract claim. It argues that courts have not allowed plaintiffs to manipulate pleading devices so that they disguise their challenges to rates by labelling them as state law claims.

There is nothing "manipulative" in the role that the Contract plays in the Smilow Action. It is the core of the case. In the Smilow Action, the three causes of action set forth in the Complaint are all based upon Southwestern Bell's failure to bill its customers pursuant to the terms of the Contract. Unlike the complaint in *In re Comcast* which included causes of action which challenged the "fairness" and "reasonableness" of the defendant's billing practices, the Smilow Complaint addresses only the fact that Southwestern Bell breached the Contract and whether this breach was a violation of the Massachusetts Consumer Protection Act and "unjust" in violation of under the Communications Act.

Hardy v. Claircom Communications Group, 937 P.2d 1128 (Wash.Ct.App. 1997) is equally unpersuasive on this point. The court in *Hardy* found that plaintiffs had alleged that defendant took "millions of dollars in additional charges that it is not entitled to and consumers overpay" and challenged the reasonableness of the rates charged by defendant. In addition, in that case, plaintiffs did not allege that they or any other member of the class had paid anything other than the filed tariff rate. Thus, the claims in that case challenged the actual rates that were set forth in the tariff filed with the Commission and hence, were barred by the filed tariff doctrine.

Southwestern Bell Must Conduct Its Business In Compliance with State Laws

Southwestern Bell's request that the Commission find that state law claims are barred under § 332(c)(3) of the Communications Act asks the Commission to ignore the language of § 332(c)(3)(A), the savings clause of the Communications Act (47 U.S.C. § 414) as well as case law interpreting the Communications Act. Southwestern Bell's

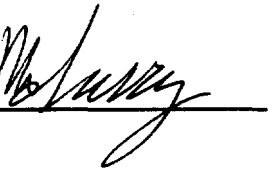
business practices, which do not involve regulation of the rates it charges its consumers, are subject to state law in the same manner that any business must obey the laws of any state where it conducts business. Southwestern Bell cannot immunize itself from liability for breach of contract, by transforming, through mischaracterization and contorted logic, any claim challenging any of its business practices into a challenge to the reasonableness of its rates.

Conclusion

For all of the foregoing reasons, the Commission should dismiss the Petition without a ruling.[14]

Dated: December 23, 1997

Respectfully submitted by the attorneys for the plaintiff and the class in the Smilow Action,



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I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL-HAND-~~BOX~~ ON 12/23/97

Federal Express

[14] Alternatively, if any ruling is to be forthcoming, it should explicitly reflect that it is not designed or intended to decide the issues raised in the Smilow Action.

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, On Her Behalf And On Behalf Of All Others Similarly Situated,

Plaintiff,

VS.

SOUTHWESTERN BELL MOBILE SYSTEMS, INC., Doing Business As Cellular One,

Defendant.

97-10307REK

Civil Action No.

PLAINTIFF DEMANDS A TRIAL BY JURY

CLASS ACTION COMPLAINT

Plaintiff alleges upon knowledge with respect to herself and her own acts and upon information and belief as to the other allegations, based upon the investigation of her attorneys:

I. INTRODUCTION

1. This is a class action brought by the plaintiff on her own behalf and on behalf of all other similarly situated persons and entities in the United States which purchased cellular telephone services from the defendant Southwestern Bell Mobile Systems, Inc.

2. The plaintiff brings this action against the defendant for overcharging the plaintiff and the members of the class for cellular telephone service. In doing so, the defendant breached its written contracts with the plaintiff and the members of the

class and violated Section 201 (b) of the Communications Act (47 U.S.C. § 201 (b)) and M.G.L. Ch. 93A, section 2(a).

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to section 207 of the Communications Act of 1934 (the "Communications Act") (47 U.S.C. § 207) and 18 U.S.C. §§ 1331 and 1367.

4. The claims asserted herein arise under Sections 201, 206 and 207 of the Communications Act (47 U.S.C. §§ 201, 206 and 207), Massachusetts General Laws, Chapter 93A, § 2(a) and the common law.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the defendant corporation resides in the Commonwealth of Massachusetts and because a substantial part of the events and omissions giving rise to the claims occurred in this District.

III. PARTIES

6. Plaintiff Jill Ann Smilow is a natural person who resides in Lexington (Middlesex County) Massachusetts. On December 31, 1995, she entered into a contract for cellular telephone service with the defendant Southwestern Bell Mobile Systems, Inc., doing business as "Cellular One."

7. The defendant Southwestern Bell Mobile Systems, Inc., is a corporation organized under the laws of both the State of Delaware and the State of Virginia. It is a wholly owned subsidiary of SBC Communications Inc., which until April, 1995 was known as Southwestern Bell Corporation.

8. The defendant is in the business of selling cellular services in many cities in Massachusetts and in many other states throughout the United States. It has offices in Boston and other cities in the Commonwealth of Massachusetts.

9. The defendant conducts its cellular business in Massachusetts and in all other states in which it operates, other than Texas, Missouri, Oklahoma, Kansas and Arkansas, under the trade name "Cellular One," a service mark which is owned by Cellular One Group, which is a partnership in which the defendant, or an affiliate of the defendant, has an ownership interest.

10. The defendant is one of the largest providers of cellular telephone services in the United States. It sells cellular services in at least 35 metropolitan markets, including Boston, Massachusetts; Washington, D.C.; Chicago, Illinois; St. Louis, Missouri; and Dallas-Ft. Worth, Texas, which are 5 of the 15 largest metropolitan markets in the United States and in at

least 28 rural service areas, directly or through partnerships in which it has an ownership interest.

11. The defendant Southwestern Bell Mobile Systems, Inc. is sometimes referred to herein as "the defendant," or "Cellular One."

IV. FACTS

A. The Contract

12. Cellular One sells cellular service pursuant to written "form" contracts which are drafted by the defendant. A copy of the contract between the plaintiff and the defendant ("the Contract") and an enlarged copy thereof, are attached hereto as Exhibit 1.

13. Under the Contract, defendant is allowed to charge its subscribers only for the time during which they make use of its services on calls originated by the subscriber's mobile unit.

14. Paragraph 13 of the Terms and Conditions of the Contract provides as follows:

> 13. Chargeable time for calls originated by a Mobile Subscriber Unit starts when the Mobile Subscriber Unit signals call initiation to C1's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to C1's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

15. The time described in paragraph 13 of the Contract, for which defendant may charge its subscribers, is hereinafter sometimes referred to as the "Chargeable Time."

B. <u>The Defendant Overcharges For Cellular Service</u>

<u>The Defendant Charges For Calls Received By Its Cellular Customer's Cellular Phone</u>

16. Neither paragraph 13, nor any other provision of the Contract, allows the defendant to charge the plaintiff for time in connection with calls received by the plaintiff's cellular phone.

17. By charging the plaintiff and the members of the class for time in connection with calls received by their cellular phones, defendant has breached and continues to breach the Contract.

The Defendant Rounds Up Time In Connection With Each Call To The Next Whole Minute

18. Paragraph 13 of the Contract allows the defendant to charge the plaintiff and the members of the class for calls originated by a Mobile Subscriber Unit only for the period from when "the Mobile Subscriber Unit signals call initiation to C1's facilities" to "when the Mobile Subscriber Unit signals disconnect to C1's facilities and the call disconnect signal has been confirmed."

19. Defendant has breached and continues to breach the contract by charging the plaintiff and the members of the class for the additional time resulting from the defendant's practice of rounding Chargeable Time actually used by the subscriber on each cellular telephone call, up to the next whole minute.

20. Except for the rare instances when a call uses Chargeable Time that is an exact number of minutes (and no seconds), the defendant, in assessing its charges, rounds up every call to the next whole minute. The defendant never rounds the Chargeable Time down to the next lower whole minute, but always rounds the time up to the next whole minute. Hence, all calls with Chargeable Time ending anywhere from one second to 59 seconds are rounded up to the next whole minute.

21. For example, if the Chargeable Time for a cellular telephone call was three minutes and 5 seconds, the defendant would actually charge the plaintiff and the members of the class for four minutes.

22. The plaintiff estimates that as a result of defendant's practice of rounding up the time of each telephone call to the next whole minute, the defendant overcharges the plaintiff and each member of the Class an average of 30 seconds for each call.

V. CLASS ACTION ALLEGATIONS

23. This action is brought by the plaintiff as a class action, pursuant to Rules 23(a), 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of all persons and entities throughout the United States which purchased cellular service from the defendant Southwestern Bell Mobile Systems, Inc., pursuant to contracts similar to the plaintiff's Contract which:

a. provide for charges only for calls originated by the customer's cellular phone and not for calls received by the customer's cellular phone; and/or

b. contain a definition of Chargeable Time or a description or definition of the time for which a charge may be

made, which does not include time resulting from the rounding up to the next whole minute the time of each call; and

c. do not incorporate by reference or provide that they are governed by any tariff filed by the defendant with any governmental agency.

24. Excluded from the class are the defendant, and its affiliates, including any partnerships or other entities in which the defendant has an ownership or controlling interest or which holds a controlling interest in the defendant, including SBC Corporation, Inc., the officers and directors of the defendant and the defendant's affiliates, and members of their immediate families.

25. This action is properly brought as a class action because:

a. The members of the class are so numerous that joinder of all members is impracticable. As of the end of 1995, the defendant had approximately 3.6 million cellular customers, many of whom are members of the class. The class also includes some of the defendant's former cellular customers.

b. The plaintiff's claims are typical of the claims of the members of the class because plaintiff has been

overcharged by the defendant due to its practices of charging for calls received by her cellular phone and rounding up fractional minutes of cellular telephone calls to the next whole minute, in the same manner that all of the members of the class have been overcharged by those practices. The plaintiff and all members of the class sustained damages as a result of the defendant's wrongful conduct alleged herein.

c. The plaintiff is a proper class representative who will fully and adequately protect the interests of the members of the class. The plaintiff has retained competent counsel who have substantial experience and expertise in class action litigation. Plaintiff has no interest antagonistic with, contrary to, or in conflict with the members of the class she seeks to represent.

d. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, because joinder of all members of the class is impracticable. The prosecution of separate actions by individual members of the class would create a risk of inconsistent and varying adjudications concerning the subject of this action. Furthermore, as damages suffered by individual members of the class may be relatively small, the expense and burden of individual litigation may make it impossible for most members individually to redress the wrongs done to them. The likelihood of individual members of the class prosecuting separate claims is